D.A. Fiori Construction Company *and* International Union of Operating Engineers, Local Union No. 66, 66A, B, C, D, O, & R, AFL–CIO. Case 6–CA–30331

July 12, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon a charge filed by the Union on February 8, 1999, the General Counsel of the National Labor Relations Board issued a complaint on March 31, 1999, against D.A. Fiori Construction Company, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On May 21, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On May 25, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, at the Respondent's request, granted an extension of time to file an answer to the complaint, but that despite this extension, no answer has been filed.

In the absence of good cause being shown for the failure to file an answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation, with an office and place of business in Pittsburgh, Pennsylvania, has been engaged as an excavating contractor in the construction industry performing commercial construction at various jobsites, including jobsites located in Wilkins Township, Oakmont (the Longview jobsite), and Springdale, Pennsylvania. During the 12-month period ending January 31, 1999, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 for Mistick, Inc., a corporation with an office and a place of business in Pittsburgh, Pennsylvania. During the 12-month period ending January 31, 1999, Mistick, Inc., in conducting its business operations, performed services valued in excess of $50,000 in States other than the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Union of Operating Engineers, Local Union No. 66, 66A, B, C, D, O, & R, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees engaged in construction work employed by the Employer at its Pennsylvania jobsites, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

Since about April 8, 1998 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since about November 4, 1998, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a memorandum of understanding dated November 4, 1998.

At all times since November 4, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit. By letters dated November 10 and December 18, 1998, respectively, the Union has requested that the Respondent furnish it with the names and dates of hire, the wage rate, and the job classification for each bargaining unit employee; a copy of any work rules; a copy of the health care plan, a summary plan description, any material modifications made to the plan, a detailed explanation of plan participant eligibility, and a letter from the health care provider detailing the total cost of the plan, per employee participant; a copy of any pension plan, a summary plan description, any material modifications made to the plan, contribution amounts made into the plan by the Respondent, as well as the vesting status and pension account balances for each employee.

This information is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about November 10 and December 18, 1998, the Respondent

has failed and refused to furnish the Union with the information requested by it.

Since about May 28, 1998, certain employees of the Respondent employed at the Springdale and Longview jobsites engaged in a strike. The strike was caused by the Respondent's unfair labor practices as alleged in a complaint which issued in Case 6–CA–29706, et al.

The complaint in Case 6–CA–29706 alleged that the Respondent, by Owner David A. Fiori Jr.: about April 8, 1998, at the Springdale jobsite, threatened to kill an employee because he joined the Union; about May 20, 1998, at the Longview jobsite, interrogated its employees about their union activities, impliedly threatened to close the business, and informed its employees they were disloyal because of their support for the Union; and about June 12, 1998, by telephone, promised an employee unspecified benefits if he would withdraw his charge against the Respondent.

In addition, the complaint in Case 6–CA–29706 alleged that about April 8, 1998, the Respondent discharged employees Sean Puz, Jeff Whitico, and Merle Schilling, that these employees were reinstated by the Respondent on April 13, 1998, and that on that date, the Respondent reduced the work hours of employees Puz and Whitico. The complaint also alleged that about May 6, 1998, the Respondent issued a written warning to employee Whitico. The complaint further alleged that the Respondent engaged in this conduct because the named employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and that the Respondent reduced the work hours of employees Puz and Whitico, and issued a written warning to Whitico because these employees gave testimony to the Board.

The violations alleged in Case 6–CA–29706 were resolved by virtue of an adjusted withdrawal (non-Board settlement agreement) of the complaint allegations, and the General Counsel does not seek a remedy here for this conduct. Rather, the General Counsel seeks a finding in this case that the conduct alleged in Case 6–CA–29706 constitutes unfair labor practices, which serve as a predicate to the May 28, 1998 strike.[1]

About January 14, 1999, by letter, employees Sean Puz and Jeff Whitico, who had engaged in the unfair labor practice strike, made an unconditional offer to return to their former positions of employment. Since about January 14, 1999, the Respondent has failed and refused to reinstate these employees to their former positions of employment.

[1] The complaint here re-alleged as unlawful the conduct in Case 6–CA–29706, alleged that such conduct was a predicate for the strike, and alleged that the strike was an unfair labor practice strike. The Respondent's non-answer to the complaint is an admission of all of the above.

CONCLUSION OF LAW

The strike commencing on May 28, 1998, is an unfair labor practice strike.

By failing and refusing to reinstate unfair labor practice strikers Puz and Whitico to their former positions of employment after they made an unconditional offer to return to work as described above, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. Further, by failing and refusing to furnish the Union with the information requested by it, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act. The Respondent has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We have further found that the strike, which began on May 28, 1998, was an unfair labor practice strike. In addition, having found that the Respondent has violated Section 8(a)(3) and (1) by failing and refusing to reinstate employees Sean Puz and Jeff Whitico to their former positions of employment, we shall order the Respondent to offer the discriminatees and, on their application, any other strikers, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful failure to reinstate, and to notify the discriminatees in writing that this has been done.

Further, having found that the Respondent has failed to provide the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, we shall order the Respondent to furnish the Union the information requested.

ORDER

The National Labor Relations Board orders that the Respondent, D.A. Fiori Construction Company, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate employees Puz and Whitico after they made an unconditional offer to return to work following the unfair labor practice strike.

(b) Failing and refusing to provide necessary and relevant information to the Union, on request.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees engaged in construction work employed by the Employer at its Pennsylvania jobsites, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on November 10 and December 18, 1998.

(c) Within 14 days from the date of this Order, offer Sean Puz and Jeff Whitico full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Sean Puz and Jeff Whitico whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failures to reinstate, and within 3 days thereafter notify the employees in writing that this has been done and that the failures to reinstate will not be used against them in any way.

(f) Accord all employees engaged in the strike which started on May 28, 1998, the rights and privileges of unfair labor practice strikers, including, on their unconditional application, offering strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and making whole for any loss of earnings strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement, in the manner set forth in the remedy section of this decision.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Pittsburgh, Pennsylvania, and at its Pennsylvania jobsites, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 10, 1998.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 12, 1999

Sarah M. Fox,	Member
Wilma B. Liebman,	Member
Peter J. Hurtgen,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate Sean Puz and Jeff Whitico after they made an unconditional offer to return to work following the unfair labor practice strike.

WE WILL NOT fail and refuse to provide necessary and relevant information to the Union, on request.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees engaged in construction work employed by us at our Pennsylvania jobsites, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on November 10 and December 18, 1998.

WE WILL within 14 days from the date of the Board's Order, offer Sean Puz and Jeff Whitico full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Sean Puz and Jeff Whitico whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate Sean Puz and Jeff Whitico, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the failure to reinstate will not be used against them in any way.

WE WILL accord all striking employees from the strike which started on May 28, 1998, the rights and privileges of unfair labor practice strikers, including, on their unconditional application, offering strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and making whole for any loss of earnings strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement, in the manner set forth in the remedy section of this decision.

D.A. FIORI CONSTRUCTION COMPANY